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AN EMPIRICAL STUDY OF REFORMING COMMERCIAL ARBITRATION IN CHINA

Dr. Mimi Zou^{*}

I. INTRODUCTION

China's rapid integration into the global economy has seen an ever-growing number of domestic, foreign-related, and cross-border commercial disputes involving Chinese and foreign parties.¹ Foreign-related and cross-border commercial disputes have taken greater importance with Chinese companies going abroad and major government initiatives such as the Belt and Road Initiative (BRI).² The scope, scale, and complexity of such disputes have also increased dramatically.³ Considering these developments, the Chinese leadership and its law and policy makers have taken significant steps in recent years to reform the country's dispute resolution mechanisms, including commercial arbitration.⁴

The pressing need to deal with the rising number and complexity of commercial disputes have created some impetus among Chinese policymakers to address the deficiencies of the current regulatory framework and institutional mechanisms.

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¹ Guo Shining, *The Rise of Chinese Investors as Claimants: What Are the Likely Impacts on International Arbitration?* CHINA LAW INSIGHT (June 25, 2018), <https://www.chinalawinsight.com/2018/06/articles/dispute-resolution/the-rise-of-chinese-investors-as-claimants-what-are-the-likely-impacts-on-international-arbitration/>. See generally *China's Arbitration Agencies Handle Over 2.6 Million Cases*, XINHUA NEWS (Mar. 30, 2019), http://www.xinhuanet.com/english/2019-03/30/c_137935680.htm [hereinafter *China's Arbitration Agencies*].

² Shining, *supra* note 1. See Bruce Love, *China Belt and Road Disputes Set to Fuel Mediation's Global Rise*, FINANCIAL TIMES (Aug. 13, 2019), <https://www.ft.com/content/71288fe2-9e6f-11e9-9c06-a4640c9feebb>.

³ See generally Love, *supra* note 2.

⁴ *China's Arbitration Agencies*, *supra* note 1; Zachary Mollengarden, "One-Stop" Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics, 36 PAC. BASIN L. J. 65, 77-79 (2018).

Some of these problems relate to the slow pace of law-making, which means that legal provisions are outdated or lacking in detail. Such problems are especially acute when it comes to commercial disputes with foreign or cross-border elements, such as disputes involving conflict of laws or the recognition and enforcement of foreign arbitral awards.⁵

This paper examines recent reforms to the regulatory and institutional framework of commercial arbitration in China, based on an empirical study conducted between 2018 and 2019 of semi-structured interviews with over 80 actors, including Chinese lawmakers and policymakers, judges, arbitration institutions, legal practitioners, academic researchers, and companies and users of arbitration. The author has also consulted a variety of primary materials including publicized laws, regulations and policies, official reports, data and statistics, and internal guidelines and policy documents of the various actors that were interviewed for this study.

II. THE FRAMEWORK FOR ARBITRATION IN CHINA

2.1. Types of Arbitration

Since the enactment of China's main national legislation on arbitration, The Arbitration Law of the People's Republic of China, in 1994, Chinese arbitration institutions have handled over 2.6 million commercial and civil cases.⁶ In 2018, approximately 540,000 arbitration cases were heard, an increase of 127% since 2017.⁷ Chinese law distinguishes between domestic arbitration, foreign-related arbitration, foreign arbitration, and arbitration involving Hong Kong, Macau, and Taiwan.⁸ The Arbitration Law requires domestic cases to be heard by a Chinese arbitration institution.⁹ Under Chinese contract law, all domestic contracts must be governed by Chinese law.¹⁰ Judicial review of domestic arbitral awards—a process which courts undertake to ensure, for example, that procedural fairness has been followed in the arbitration process or that the arbitral award is consistent with the law and public policy—is also different from foreign-related and foreign arbitral awards.¹¹

⁵ Benjamin Hayward, *The Conflict of Laws and International Commercial Arbitration*, OUPBLOG (Feb. 16, 2017), <https://blog.oup.com/2017/02/conflict-laws-commercial-arbitration/>.

⁶ *China's Arbitration Agencies*, *supra* note 1.

⁷ *Id.*

⁸ GIOVANNI PISACANE ET AL., *ARBITRATION IN CHINA: RULES & PERSPECTIVES* 4–5 (2016).

⁹ Arbitration Law of the People's Republic of China (promulgated by 8th Standing Meeting Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), ch. IV (China) [hereinafter Arbitration Law].

¹⁰ Contract Law of the People's Republic of China (promulgated by the Second Session of the Ninth Nat'l People's Cong., effective March 15, 1999), art. 126 (China) [hereinafter Contract Law].

¹¹ *Provisions of the Supreme People's Court on Several Issues concerning Deciding Cases of Arbitration-Related Judicial Review*, CHINA INT'L COM. CT. (Dec. 26, 2017), <http://cicc.court.gov.cn/html/1/219/199/201/782.html>.

Chinese arbitration institutions hear foreign-related arbitration or arbitration with a foreign element—that is, cases involving a foreign party, foreign subject matter, or other foreign factors.¹² Meanwhile, parties to a foreign-related contract may choose the applicable law, institution, rules, and seat for the resolution of contractual disputes unless stipulated otherwise by law.¹³ Foreign arbitration refers to arbitration of disputes administered by foreign arbitral institutions or ad hoc arbitration outside of mainland China.¹⁴ Disputes between wholly foreign owned enterprises (“WFOEs”) registered in a Free Trade Zone (“FTZ”) can be heard outside of mainland China, but WFOEs registered elsewhere in China must have their disputes heard by a Chinese arbitration institution.¹⁵

2.2 Arbitration Institutions

There are approximately 255 arbitration institutions in China.¹⁶ The preeminent arbitration institutions that handle the most foreign-related arbitration cases include the China International Economic and Trade Arbitration Commission (“CIETAC”), Beijing Arbitration Commission/Beijing International Arbitration Centre (“BAC/BIAC”), Shanghai International Arbitration Centre (“SHIAC”) and Shenzhen Court of International Arbitration (“SCIA”).¹⁷ In 2018, CIETAC handled 522 foreign-related cases among their 2,962 new cases.¹⁸ In the same year, BAC dealt with eighty-eight foreign-related arbitration cases among their 2,547 cases.¹⁹

¹² See Arbitration Law, *supra* note 9, at ch. VII; Law of China on the Laws Applicable to Foreign-Related Civil Relations (promulgated by the 11th Nat’l People’s Cong., effective Oct. 28, 2010), art. 1 (China); *Interpretation of the Supreme People’s Court on Several Issues Concerning Application of the “Law of the People’s Republic of China on Choice of Law for Foreign-Related Civil Relationships” (I)*, CHINA INT’L COM. CT. (Jan. 7, 2013), <http://cicc.court.gov.cn/html/1/219/199/201/679.html>.

¹³ Contract Law, *supra* note 10.

¹⁴ Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China’s Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT’L L. J. 361, 361 (2013); Hui Zhong Law Firm, *International Arbitration Laws and Regulations | China*, GLOBAL LEGAL INSIGHTS (2019), <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/china>.

¹⁵ Opinions of the Supreme People’s Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones, CHINA INT’L COM. CT. (Jan. 9, 2017), <http://cicc.court.gov.cn/html/1/219/199/201/807.html>.

¹⁶ *China’s Arbitration Agencies*, *supra* note 1.

¹⁷ CIETAC is the oldest and largest arbitration institution in China. Crystal Wong Wai Chin & Zhe Ying Lee, *Malaysia: China Arbitration Week 2019*, MONDAQ (Dec. 19, 2019), <http://www.mondaq.com/x/866636/Arbitration+Dispute+Resolution/China+Arbitration+Week+2019>. Notably, SHIAC and SCIA are entities that emerged from the splitting of two former sub-commissions in Shanghai and southern China from CIETAC in 2012. *China Arbitration: New Judicial Guidance on the CIETAC Split*, NORTON ROSE FULBRIGHT (Aug. 2015), <https://www.nortonrosefulbright.com/en/knowledge/publications/aa2b2b31/china-arbitration-new-judicial-guidance-on-the-cietac-split>.

¹⁸ *China International Economic and Trade Arbitration Commission’s 2018 Business Work Summary and 2019 Business Work Plan*, CHINA INT’L ECON. & TRADE ARB. COMMISSION (Feb. 1, 2019), <http://www.cietac.org.cn/index.php?m=Article&a=show&id=15804>.

¹⁹ *Report on the Work for 2018*, BEIJING ARB. COMMISSION (Feb. 18, 2019), <https://www.bjac.org.cn/news/view?id=3375>.

CIETAC's cases included loan disputes, shareholding disputes, service contracts, construction engineering, sale of goods, and other disputes.²⁰

A handful of foreign or "offshore" arbitration bodies such as Hong Kong International Arbitration Centre ("HKIAC"), Singapore International Arbitration Centre ("SIAC"), and International Chamber of Commerce International Court of Arbitration ("ICC") were invited by the Shanghai Municipal Commission of Commerce to set up representative offices in the Shanghai FTZ in 2015-2016.²¹ In August 2019, the State Council published a "Framework Plan for the New Lingang Area of the China (Shanghai) Pilot Free Trade Zone," which expands opportunities for "reputable" foreign arbitration and dispute resolution institutions to operate in China.²² Eligible institutions must register with the Shanghai Municipal Bureau of Justice and the Ministry of Justice.²³ As registered institutions, they may administer foreign-related arbitration proceedings in the areas of international commerce, maritime affairs and investment.²⁴

III. REFORMING CHINA'S ARBITRATION LAW

The drafters of China's Arbitration Law considered the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration.²⁵ However, China's Arbitration Law differs from the UNCITRAL Model Law in some key respects.²⁶ First, China's Arbitration Law only permits institutional arbitration in China.²⁷ It generally does not allow ad hoc arbitration, which is provided for in the UNCITRAL Model Law.²⁸ Second, under China's Arbitration Law, the arbitration institution may rule on the validity of the arbitration agreement if the parties agree.²⁹ Without the parties' agreement, the power is vested in the court.³⁰ In contrast, the UNCITRAL Model Law allows the arbitration body to rule on its own jurisdiction.³¹ Third, a party seeking preliminary or interim measures

²⁰ *CIETAC 2018 Work Report and 2019 Work Plan*, CHINA INT'L ECON. & TRADE ARB. COMMISSION, <http://www.cietac.org.cn/index.php?m=Article&a=show&id=15822&l=en> (last visited Feb. 10, 2020).

²¹ Martin Rogers, *Foreign Administered Arbitration in China: The Emergence of a Framework Plan for the Shanghai Pilot Free Trade Zone*, KLUWER ARB. BLOG (Sept. 6, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/09/06/foreign-administered-arbitration-in-china-the-emergence-of-a-framework-plan-for-the-shanghai-pilot-free-trade-zone/>.

²² *Id.*

²³ *Id.*

²⁴ *State Council on Issuing China (Shanghai) Pilot Free Trade Zone*, 15 GUOFA art. 4 (2019), http://www.gov.cn/zhengce/content/2019-08/06/content_5419154.htm; Martin Rogers, *supra* note 21.

²⁵ Xu Guojian, *China: International Arbitration 2019*, ICLG.COM, <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/china> (last accessed Feb. 11, 2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Arbitration Law, *supra* note 9, at art. 20.

³⁰ *Id.*

³¹ See Xu Guojian, *supra* note 25. See also Arbitration Law, *supra* note 9.

must apply to the arbitration institution for transfer to the relevant court, rather than applying directly to that court.³² Under the UNCITRAL Model Law, by contrast, the arbitration body may grant interim measures at the request of a party.³³

China is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention).³⁴ China has an analogous arrangement with the Hong Kong Special Administrative Region (SAR), which follows the provisions of the New York Convention that makes mutual enforcement of arbitral awards between Hong Kong SAR and mainland China possible.³⁵ In 2019, the Supreme People's Court of China and the Hong Kong SAR government issued provisions on the enforcement of arbitral awards issued in Macau SAR³⁶ and Taiwan³⁷ within mainland China.³⁸ Although the enforcement of foreign arbitral awards is possible, a practical challenge for cross-border practitioners is that Chinese law has not yet addressed the possibility of a Chinese court issuing orders to preserve assets or evidence linked to an offshore arbitration. The notable exception is the case of Hong Kong, where a new bilateral arrangement with mainland China effective October 1, 2019 means that Chinese courts will recognize and enforce interim measures in support of institutional arbitration seated in Hong Kong that is administered by a list of eligible institutions.³⁹

³² Arbitration Law, *supra* note 9, at art. 28.

³³ This is unless otherwise agreed by the parties. See United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* art. 17 (Vienna: United Nations, 2008), available from www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

³⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 4739, treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=en.

³⁵ Arrangement of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (Interpretation No. 3 [2000] of the Supreme People's Court, as adopted at the 1069th Session of the Judicial Committee of the Supreme People's Court on June 18, 1999, effective Feb. 1, 2000), CLI.3.26466(EN) (Lawinfochina); Jingzhou Tao, Christina Wang & Meng Xiao, *ICC Country Answers: China*, INT'L CHAMBER COM.: DIGITAL LIBR. (2013), https://library.iccwbo.org/content/dr/COUNTRY_ANSWERS/CA_SUPP_0029_14.htm?l1=Country+Answers&l2=China.

³⁶ Arrangement Between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards (Interpretation No. 17 [2007] of the Supreme People's Court, as adopted at the 1437th Session of the Judicial Committee of the Supreme People's Court on Sept. 17, 2007, effective Jan. 1, 2008), CLI.3.100171(EN) (Lawinfochina).

³⁷ Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region (Interpretation No. 14 [2015] of the Supreme People's Court, as adopted at the 1653rd Session of the Judicial Committee of the Supreme People's Court on June 2, 2015, effective July 1, 2015), CLI.3.250444(EN) (Lawinfochina).

³⁸ Zhang Shouzhi, Huang Tao and Xiong Yan, *China*, THE ASIA-PACIFIC ARBITRATION REVIEW, <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2020/1193376/china>.

³⁹ Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (as issued on Sept. 26, 2019, effective Oct. 1, 2019), CLI.3.330973(EN) (Lawinfochina) [hereinafter Arrangement Concerning Mutual Assistance with Hong Kong].

Many Chinese legal professionals and experts interviewed in this study consider the Arbitration Law outdated.⁴⁰ Amending the Arbitration Law has been placed on the National People's Congress's ("NPC") five-year legislative plan issued on September 7, 2018, with the State Council assuming the main responsibility for the deliberation and drafting process.⁴¹ The proposed legislative revision of the Arbitration Law is classified as one of forty-seven "Class II Projects" on the NPC's legislative plan for 2018-2023,⁴² which are not prioritized like the sixty-nine "Class I Projects".⁴³ Although the official amendment of the legislation by the NPC is unlikely to occur within the next two years, preparatory work has started.⁴⁴ In April 2019, the Communist Party of China ("CPC") Central Committee and State Council General Offices released a policy document on arbitration reform, calling for greater CPC leadership and promoting the international reputation of Chinese arbitral institutions.⁴⁵

IV. OPPORTUNITIES FOR FURTHER REFORM

A pro-arbitration culture in China's commercial dispute resolution landscape has developed rapidly and is anticipated to grow further in coming years, given the regulatory and policy emphasis on the promotion of diversified dispute resolution mechanisms in recent years.⁴⁶ On 1 August 2019, the Supreme People's Court ("SPC") issued an opinion on one-stop diversified dispute resolution, which is aimed at reducing the number of cases filed, heard, and tried by the courts.⁴⁷ For commercial disputes, it is intended to push disputes to institutions, including arbitration institutions that can resolve cases in a more competent, efficient, and timely manner.⁴⁸

It should also be noted that mediation has taken on new importance under policymakers' push for diversified dispute settlement. International commercial mediation will take on new status if China ratifies the UN Convention on

⁴⁰ *Id.* See *infra* Appendix 1.

⁴¹ Changhao Wei, *Translation: 13th NPC Standing Committee Legislative Plan*, NPC OBSERVER (Sept. 7, 2018), <https://npcobserver.com/2018/09/07/translation-13th-npc-standing-committee-five-year-legislative-plan/>.

⁴² Class II projects refer to draft laws (and amendments) that are subject to expedited work and will be "submitted for deliberation when the conditions become mature." *Id.*

⁴³ Class I projects refer to draft laws "for which the conditions are relatively mature, and which are planned to be submitted for deliberation during the term." *Id.*

⁴⁴ General Offices of the CPC Central Committee, *About Improving the Arbitration System: Opinions on Improving the Credibility of Arbitration*, HANZHONG ARB. COM. (Jan. 28, 2019) http://www.hzzcwyh.cn/flfg/msssfjs/201901/t20190128_567165.html.

⁴⁵ *Id.*

⁴⁶ See Opinions of the Supreme People's Court on Building One-stop Diversified Dispute Resolution Mechanisms and One-stop Litigant Service Centers (No. 19 [2019] of the Supreme People's Court, as issued on July 31, 2019, effective Aug. 1, 2019), CLI3.334602(EN) (Lawinfochina) [hereinafter *Opinions on One-Stop Diversified Dispute Resolution Mechanisms and One-stop Litigant Service Centers*].

⁴⁷ *Id.*

⁴⁸ Arbitration Law of the People's Republic of China, *supra* note 3, at art. 9, 10.

Enforcement of Mediated Settlement Agreements (Singapore Mediation Convention).⁴⁹ China was among the forty-six countries that signed the Convention in early August 2019.⁵⁰ The main thrust of the Convention is to enable mediated agreements in commercial disputes to be enforced internationally like an arbitral award.⁵¹ Most of the leading arbitral institutions in China have established linked mediation organizations and have amended their rules to enable parties to have their dispute mediated by different persons from the appointed arbitrators.⁵²

There are further opportunities for bringing China's arbitration regime, and its dispute resolution framework more generally, closer to international practices and enhancing the international competitiveness of Chinese arbitration institutions. The abovementioned SPC Opinion states that "the diversity of the laws and cultures of parties from home and abroad shall be fully respected, and they shall be supported in voluntarily choosing mediation, arbitration, and other non-litigation methods to solve disputes."⁵³ It further calls for the strengthening of exchange and cooperation between the judicial institutions, arbitration institutions, and mediation organizations in China and other countries.⁵⁴ In this context, the Opinion emphasizes the goal of "improving the international competitiveness and credibility of China's dispute resolution mechanism."⁵⁵

V. CONCLUSION

There have been numerous high-level initiatives in commercial arbitration reform in China in recent years, including the development of a "diversified dispute resolution" framework, pilot reforms in FTZs, and the establishment of new institutions such as the China International Commercial Court.⁵⁶ Chinese arbitration institutions have also rapidly adopted international practices in their rules and operations. At the same time, the regulatory framework for arbitration in China needs urgent reform to deal with the increasing number and complexity of disputes, especially those with foreign or cross-border elements. As this process of reform is underway,

⁴⁹ Opinions on One-Stop Diversified Dispute Resolution Mechanisms and One-stop Litigant Service Centers, *supra* note 46.

⁵⁰ Cara Wong, *46 Countries Sign International Mediation Treaty Named After Singapore*, THE STRAITS TIME (Aug. 7, 2019), <https://www.straitstimes.com/singapore/key-facts-about-the-singapore-convention-on-mediation>.

⁵¹ U.N. Comm'n on Int'l Trade Law, U.N. Convention on International Settlement Agreements Resulting from Mediation, UNCITRAL 3 (Mar. 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf.

⁵² Jie Zheng, *Competition Between Arbitral Institutions in China—Fighting for a Better System?*, KLUWER ARB. BLOG (Oct. 16, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system/>.

⁵³ Opinions on One-Stop Diversified Dispute Resolution Mechanisms and One-stop Litigant Service Centers, *supra* note 46.

⁵⁴ *Id.*

⁵⁵ Arbitration Law, *supra*, note 9, at art. 16.

⁵⁶ See Opinions on One-Stop Diversified Dispute Resolution Mechanisms and One-stop Litigant Service Centers, *supra* note 46.

there are exciting opportunities for national-level and local experimentation and innovation.

Appendix 1: Main national legislation related to commercial arbitration/dispute resolution

	Promulgated by	Effective date (and any subsequent amendments)
Arbitration Law	National People's Congress Standing Committee (NPCSC)	September 1, 1995 (amended in August 2009 and September 2017)
Civil Procedure Law	National People's Congress (NPC)	April 9, 1991 (amended in October 2007, August 2012, June 2017)
Contract Law	NPC	October 1, 1999
General Principles of Civil Law	NPCSC	January 1, 1987
General Principles of Civil Law	NPCSC	October 1, 2017
Law on Choice of Law for Foreign-related Civil Relationships	NPCSC	April 1, 2011

Appendix 2: Main Judicial Interpretations issued by the Supreme People's Court of China relating to commercial arbitration/dispute resolution

	Effective date
Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region	October 1, 2019
Interpretation on Several Issues Concerning the Application of the Arbitration Law	December 31, 2008
Interpretation on the Application of the Civil Procedure Law	April 4, 2015
Interpretation on Several Issues Concerning the Application of the Trial Supervision Procedure of the Civil Procedure Law	December 1, 2008
Interpretation on Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law	January 1, 2009
Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships (I)	January 7, 2013
Interpretation on Issues Concerning the Application of the Contract Law (I)	December, 29 1999
Interpretation on Issues Concerning the Application of the Contract Law (II)	May 13, 2009
Interpretation on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts	July 1, 2012
Interpretation on Some Issues Regarding the Application of Security Law	December 13, 2000
Opinion (For Trial Use) on Questions Concerning the Implementation of the General Principles of Civil Law	April 2, 1988